MOTION FILED NOV 12 1947

No. 172 MISC.

IN THE

Supreme Court of the United States

No. ORIGINAL. OCTOBER TERM, 1947.

EX PARTE TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, AN UNINCORPORATED ASSOCIATION, MARY HANSCOM, VIRGINIA WIGGLESWORTH, AND ELIZABETH RYAN, Individually.

IN THE MATTER OF THE PETITION OF TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, AN UNINCORPORATED ASSOCIATION, MARY HANSCOM, VIRGINIA WIGGLESWORTH, AND ELIZABETH RYAN, Individually,

For a Writ of Mandamus

vs.

THE HONORABLE JOHN BIGGS, JR., JUDGE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE HONORABLE GUY L. FAKE AND THOMAS F. MEANEY, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES OF THE DISTRICT OF NEW JERSEY, *or, in the alternative*

For a Writ of Certiorari

to

THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI.

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. ORIGINAL.

EX PARTE TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, AN UNINCORPORATED ASSOCIATION, MARY HANSCOM, VIRGINIA WIGGLESWORTH, AND ELIZABETH RYAN, Individually.

IN THE MATTER OF THE PETITION OF TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, AN UNINCORPORATED ASSOCIATION, MARY HANSCOM, VIRGINIA WIGGLESWORTH, AND ELIZABETH RYAN, Individually,

For a Writ of Mandamus

vs.

THE HONORABLE JOHN BIGGS, JR. JUDGE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE HONORABLE GUY L. FAKE AND THOMAS F. MEANEY, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES OF THE DISTRICT OF NEW JERSEY, *or, in the alternative*

For a Writ of Certiorari

to

THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI.

I. Petitioners respectfully move this Court:

1. For leave to file the petition hereto annexed, for a writ of mandamus, or, in the alternative, for a

writ of certiorari, under sections 262 and 234 of the Judicial Code as amended (28 U. S. C. A. Sections 377 and 342).

2(a) That a rule be entered and issued directing the Honorable John Biggs, Jr., Judge of the United States Circuit Court of Appeals for the Third Circuit, and the Honorable Guy L. Fake and Thomas F. Meaney, Judges of the District Court of the United States for the District of New Jersey, to show cause why a writ of mandamus should not issue against them in accordance with the prayer of said petition, and why petitioners should not have such other and further relief as may be just and proper; *or in the alternative,*

(b) That a rule be entered and issued directing Alfred E. Driscoll, Governor of the State of New Jersey, and Walter D. Van Riper, Attorney General of said State and Harry C. Harper, Commissioner of Labor of said State to show cause why a writ of certiorari should not issue, in accordance with the prayer of said petition, and why petitioners should not have such other and further relief as may be just and proper.

II. In the event this Court determines that it has jurisdiction under Sections 266 and 238 of the Julicial Code, as amended (28 U. S. C. A. Secs. 380 and 345) to entertain the appeal in the case of *Traffic Telephone Workers' Federation of New Jersey, an unincorporated association, Mary Hanscom, Virginia Wigglesworth and Elizabeth Ryan, individually* v. *Alfred E. Driscoll, Governor of the State of*

New Jersey, Walter D. Van Riper, Attorney General of the State of New Jersey, and Harry C. Harper, Commissioner of Labor of the State of New Jersey, No. October Term, 1947, petitioners hereby consent to the dismissal of the annexed petition.

Respectfully,

ISRAEL B. GREENE,
Attorney for Petitioners,
1180 Raymond Boulevard,
Newark, N. J.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. Original.

EX PARTE TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, AN UNINCORPORATED ASSOCIATION, MARY HANSCOM, VIRGINIA WIGGLESWORTH, AND ELIZABETH RYAN, Individually.

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THE HONORABLE JOHN BIGGS, JR. JUDGE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE HONORABLE GUY L. FAKE AND THOMAS F. MEANEY, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES OF THE DISTRICT OF NEW JERSEY, *or, in the alternative*

For a Writ of Certiorari

to

THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

The petition of TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, an unincorporated association, and

MARY HANSCOM, VIRGINIA WIGGLESWORTH, and ELIZABETH RYAN, individually (hereinafter referred to as "petitioners" or plaintiffs) for a writ of mandamus against the Honorable John Biggs, Jr., Judge of the United States Circuit Court of Appeals for the Third Circuit, and the Honorable Guy L. Fake and Thomas F. Meaney, Judges of the District Court of the United States for the District of New Jersey, or in the alternative, for a writ of certiorari directed to the District Court of the United States for the District of New Jersey, respectfully shows:

I.

Preliminary Statement.

1. The instant petition for a writ of mandamus, or, in the alternative, for a writ of certiorari, is directly related to the case of "Traffic Telephone Workers Federation of New Jersey, an unincorporated association, and Mary Hanscom, Virginia Wigglesworth, and Elizabeth Ryan, individually *vs.* Alfred E. Driscoll, Governor of the State of New Jersey, Walter D. Van Riper, Attorney General of New Jersey, and Harry C. Harper, Commissioner of Labor of the State of New Jersey",—No. this Term, now pending on appeal in this Court from an order of a three-judge District Court for the District of New Jersey, convened and constituted under Section 266 of the Judicial Code.

The order appealed from dated October 2, 1947, stayed all proceedings before said three-judge court (in the action instituted by the petitioners herein to restrain the enforcement of Sections 3 to 9 inclusive of P. L. 1947, Chapter 47

of the Laws of the State of New Jersey, as amended by P. L. 1947, Chapter 75), pending the final determination of an action instituted by the State Attorney General in the Court of Chancery of New Jersey.

Said appeal, which was filed on October 24, 1947, raises substantially the same issues for review by this Court as are raised by this petition.

2. Petitioners are advised and verily believe that this court has jurisdiction of said appeal under Sections 266 and 238 of the Judicial Code for the reasons set forth in the "Statement as to Jurisdiction" filed with said appeal. However, in view of the fact that said appeal (from a stay order under Section 266 of the Judicial Code) appears to be one of first impression, petitioners desire to file this petition in order to assure a review by this Court of said stay order, either by mandamus or certiorari, in the event this court should hold that it has no jurisdiction to review said stay order by direct appeal under Sections 266 and 238 of the Judicial Code.

II.

Jurisdiction to Grant Mandamus and Certiorari.

3 (a). The jurisdiction of this Court to issue the Writ of Mandamus prayed for is provided for by Sections 234 and 262 of the Judicial Code (28 U. S. C. A. Sections 342 and 377).

(b) The jurisdiction of this Court to issue the common law writ of certiorari prayed for is invoked under Section 262 of the Judicial Code (28 U. S. C. A. Section 377).

4. This Court has sole appellate jurisdiction over proceedings before three-judge courts properly convened under Section 266 of the Judicial Code, as amended (28 U. S. C. A. Section 380) (*Re Buder,* 271 U. S. 461, 466; *Public Service Commission* v. *Brashear Freight Lines,* 306 U. S. 204, 207; *Smith* v. *Wilson,* 273 U. S. 388) to the exclusion of the Circuit Court of Appeals. See *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10; *Brucker* v. *Fisher,* 49 F. (2d) 759 (C. C. A. 6).

Such appellate jurisdiction extends to interlocutory as well as final orders entered in suits instituted under Section 266. *Stratton* v. *St. Louis Southwestern Ry Co., supra; Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 320-321.

Where no appeal will lie from the order or decree of a District Court, this Court to protect its exclusive appellate jurisdiction from impairment by the District Court, may issue a writ of mandamus (*Stratton* v. *St. Louis Southwestern Ry Co., supra; Ex parte Public National Bank,* 278 U. S. 101; *McClellan* v. *Carland,* 217 U. S. 268; *Roche* v. *Evaporated Milk Ass'n.,* 319 U. S. 21; *Barber Asphalt Paving Co.* v. *Morris,* 132 Fed. 945 (C. C. A. 8th); or its common law writ of certiorari (*DeBeers Consol. Mines* v. *U. S.,* 325 U. S. 212; *U. S. Alkali Exp. Ass'n.* v. *United States,* 325 U. S. 196; *Ex parte Chetwood,* 165 U. S. 443, 462), to compel the District Court to adjudicate issues properly before it, and which it is under a duty to decide, or to confine the said court to a lawful exercise of its prescribed jurisdiction.

5. As hereinafter shown, the District Court exceeded its jurisdiction in granting the stay order and in refusing to determine the merits of the case, which it was its duty to

decide. Should this Court hold that the said stay order is not subject to direct appeal, then the petitioners would be remediless unless a review is granted by the writ of mandamus or certiorari prayed for.

III.

Nature of the Case and Rulings of the District Court.

(Except where otherwise indicated, all references are to the pleadings and documents in the Record returned by the Clerk of the District Court in connection with appeal in No. , pending in this Court.)

6. The case, made by the plaintiffs' complaint and the affidavits annexed thereto, and by the testimony given at the hearing, is substantially undisputed and is as follows:

Events Leading Up to This Action.

(a) Plaintiff union is, and for many years has been, the recognized collective bargaining agent for 12,000 women telephone operators who are employed by the New Jersey Bell Telephone Company, and are engaged in *interstate commerce* while so employed. The individual plaintiffs are officers and members of the Union.

(b) For a long time prior to March 31, 1947 (the expiration date of the last collective bargaining contract between the parties), representatives of the Union and of the Company had engaged in extensive negotiations for a new labor contract. Such negotiations having proved fruitless, the members of the Union voted to strike over the disputed issues after fully complying with all applicable laws, and on April 7, 1947 the entire membership of the union commenced a peaceful strike against the Company and began peaceful picketing of the Company's offices in the State of

New Jersey. The strike and picketing were then admittedly perfectly lawful under the then existing laws of New Jersey[1] (Hanscom Affidavit, Para. 1, 9-14; Mayer Aff., Para. 1-4).

(c) On the afternoon of the same day, the Governor of New Jersey, purporting to act under Section 13 of P. L. 1946, Chap. 38 of the Laws of that State (R. S. 34:13B-13)[2], by executive order directed the Commissioner of Labor of New Jersey to seize and take possession of the plants and facilities of the telephone company (Hanscom Aff., Para. 15, 16).

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[1] The New Jersey Anti-Injunction Act (R. S. 2:29-77.1 *et seq.*) and the New Jersey decisions all recognized the right of workers to strike, to picket and to engage in other peaceful strike activities. *Isolantite, Inc.* v. *United Electric Workers*, 132 N. J. Eq. 613; *Kingston Traprock* v. *International etc. Local*, 129 N. J. Eq. 570; *Heine's Inc.* v. *Truck Drivers Union*, 129 N. J. Eq. 308; *Feller* v. *Local No. 144*, 129 N. J. Eq. 421; *E. L. Kerns Co.* v. *Landgraft*, 128 N. J. Eq. 441.

[2] Section 13 provides:

"Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this act and as a result thereof the *effective operation of a public utility be threatened or interrupted*, or should either party in a labor dispute between a utility and its employees, after having given sixty days' notice thereof, or failing to give such notice, engage in any strike, work stoppage or lockout *which in the opinion of the Governor, will result in the failure to continue the operation of the public utility, and threatens the public interest, health and welfare, or in the* event that neither side has given notice to the other of an intention to seek a change in working conditions and there occurs a lockout, strike or work stoppage which, in the opinion of the Governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, then and in that case he is authorized to take immediate possession of the plant, equipment, or facility *for the use and operation by the State of New Jersey in the public interest.* Such power and authority may be exercised by the Governor through such department or agency of the government as he may designate and may be exercised after his investigation and *proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute, a threatened or actual strike,* a lockout or other labor disturbance, and that the public interest, health and welfare are jeopardized, and that the exercise of *such authority is necessary to insure the operation of such public utility, provided* that whenever such public utility, its plant, equipment or facility has been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slow-down, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute." (Italics Supplied.)

(d) On April 8, 1947, after the lawful strike had been made effective, the Legislature of New Jersey, without any public hearing or substantial debate, enacted a bill which became the statute now under attack. This bill which was introduced about two hours before its passage, had been drafted by the counsel to the Governor, *who was at the same time a Director of the Telephone Company.* Almost immediately, the Governor let it be known that if the strike were *promptly discontinued* he would not sign the bill. The union having been advised that the statute was unconstitutional, refused to end the strike. Thereupon, on April 9, 1947 at 5 p. m., the Governor signed the bill which became P. L. 1947, Chapter 47, and is popularly known as the "Utility Anti-Strike Statute"[3] (Mayer Aff., Para. 5-8; Hanscom Aff., Para. 17, 18).

(e) Sections 3 to 9 inclusive of the statute, as amended by P. L. 1947, Chapter 75[4], (which are under challenge), generally outlaw the participation in, authorization, or aiding of, strikes, work stoppages or concerted refusals to work against public utilities after their seizure by the Governor; provide for compulsory arbitration of labor disputes involving public utilities after such seizure, and provide for large and cumulative civil and criminal penalties against public utilities, unions, and their members, for violations of the statute, including refusals to abide by the arbitration award.

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[3] The official edition of Public Laws 1947, of the State of New Jersey, is not yet available; no citation to the volume and page wherein the statute may be found is, therefore, possible.

[4] The complaint filed by petitioners in the court below originally challenged only Sections 3 to 9 of Chap. 47 P. L. 1947. Eight days after this suit was filed these sections were amended by Chap. 75, P. L. 1947. The court below treated the complaint as amended so as to challenge the constitutionality of sections 3 to 9, as amended.

Section 3, as amended, provides that, after the Governor has taken or shall take possession of any public utility and during the continuance of such possession,

> "* * * it shall be unlawful for any person employed at such plant or facilities to participate in or aid in any strike, concerted work stoppage or concerted refusal to work for the State as a means of enforcing demands of employees against the State or for any other purpose contrary to the provisions of this Act."

Sections 4, 5, 6, and 7, as amended, provide for the compulsory arbitration of the dispute between the employees and the public utility while the utility is in the possession of the Governor.

Section 7 provides that the findings, decision and order of the Arbitration Board, unless modified or reversed on appeal, shall be "*conclusive and binding upon all of the parties to the dispute and such order * * * shall be complied with by the parties in accordance with the terms thereof.*" Although this section provides for an appeal to the State Supreme Court from the compulsory arbitration award, it limits the judicial review of the award by providing that:

> "In any such appeal the findings of the Board of Arbitration upon the facts, if supported by *any* evidence, shall be *conclusive.*" (Italics supplied.)

It also prohibits a stay of the award pending appeal, unless the appellate court shall so direct.

Section 8, as amended, provides:

> "Any lockout, authorized or engaged in, by any public utility in violation of any provision of this act,

or any failure or refusal by a public utility to abide by the terms of any decision or order made by any Board of Arbitration constituted in accordance with the provisions of this act, *or any strike or concerted work stoppage, authorized or engaged in, or continued to be engaged in by any labor union or representative of any craft, class or group of employees of a public utility, or any concerted action on the part of a substantial number of the members of any labor union resulting in an interruption of the operation of any public utility, in violation of any provision of this act or in connection with any refusal to abide by the terms of any decision or order made by any Board of Arbitration constituted in accordance with the provisions of this act, shall subject* such public utility and any officer or agent thereof participating or aiding therein or *such labor union or representative of any craft, class or group of employees of a public utility to a penalty in the sum of ten thousand dollars ($10,000.00) per day for each day during the period of such lockout, strike or concerted work stoppage, such penalty to be recovered in the name of the State in an action at law in any court of competent jurisdiction.* (Italics supplied).

Section 9, as amended, provides:

"Any officer or agent of any public utility or labor union, or any person performing the duties of such officer or agent, who shall willfully violate, or aid and abet the violation of any of the provisions of this act, or attempt to do so, shall, for each such offense, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five dollars ($25.00) nor more than two hundred fifty ($250.00) dollars. Each day's continuance of the violation shall constitute a separate offense." (Italics supplied.)

(f) Immediately after approving that statute, the Governor and also the defendant Attorney General publicly stated that the continuation of the strike and picketing by the Union and its members was unlawful, and instructed all law enforcement agencies throughout the State to enforce the law, and to arrest all violators thereof. These statements were broadcast over the radio and in the press.[4a]

(g) The defendants lost no time in enforcing the statute. On April 11, 1947, the individual plaintiffs were arrested by the Sheriff of Essex County on a complaint preferred by a Supervisor in the State Department of Labor, charging them with participating and aiding the strike in violation of the challenged statute. They were fingerprinted, photographed, and numbered like common criminals, and were released from custody only upon the security of bail bonds in the amount of $500 each, conditioned upon their appearance before the Grand Jury of the County. The penalty then prescribed by Section 9 of P. L. 1947, Chapter 47 (before its amendment) was a fine of not less than $250 or more than $500, or imprisonment not exceeding 30 days, or both,[5] each day's continuance of the strike being a separate offense (Hanscom Aff. Paras. 20, 21; Wigglesworth Aff. Paras. 4, 5; Ryan Aff., Paras. 4, 5).

(h) On the same day, the defendant Attorney General instituted an action against plaintiff union to recover a $10,000 penalty under Section 8 of the statute based on the continuance of the strike on April 10th in violation of the statute (Hanscom Aff. Para. 22).

[4a] Hanscom aff., para. 19, 23; Sullivan aff., para. 4; Steter, aff. para. 4; Kersten aff., para. 3; Newspaper clippings annexed to complaint.

[5] After the entry of the temporary restraining order by the District Court the legislature mollified the penalties to those mentioned on page 12 hereof.

(i) As a result of the arrest of the union's leaders, and the penalty suit, and the other acts and threats of the defendants and the police, acting under defendants' direction, many members of the plaintiff union resigned, others were frightened into stopping their peaceful picketing, and still others were intimidated into returning to work against their will. The continued enforcement of the statute threatened to impair or break the strike and to decimate the membership of the plaintiff union, with a resulting loss in dues, collective bargaining strength, and security of the union and its members. Plaintiffs and the members of the union were also threatened with a multiplicity of civil and criminal suits which, if successful, would result in exorbitant and cumulative penalties.[5a]

Action in Court Below.

7. Faced with this grave threat of irreparable injury, and being advised that the challenged statute deprived them of civil, personal and property rights guaranteed by the Constitution and Laws of the United States, plaintiffs, on April 14, 1947, filed their action in the District Court, and applied for an interlocutory and final injunction under section 266 of the Judicial Code, as amended, (28 U. S. C. A. 380), to restrain the Governor, the Attorney General, and the Commissioner of Labor, and, their agents, servants and employees and all law enforcement officers of the State (a) from enforcing or attempting to enforce the challenged statutory provisions against plaintiffs or others acting in concert with them; (b) from continuing to prose-

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[5a] Hanscom aff., para. 26, 27; Wigglesworth aff., para. 7; Ryan aff., para. 7; Sullivan aff., para. 34; Steter aff., para. 3, 4; Kersten aff., para. 1-3; Rowe aff., para. 2, 3.

cute the criminal actions against the individual plaintiffs and the penalty acton against plaintiff union, and from instituting other criminal or penalty proceedings under the statute against plaintiffs or others acting in concert with them; and (c) from making or issuing any public statements, proclamations or orders to the public or to the law enforcement officers or agents of the State, announcing or directing that the plaintiffs or any one acting in concert with them would be prosecuted civilly or criminally under the statute by reason of their work stoppage or refusal to return to work or otherwise. The complaint also prayed for a temporary restraining order, and requested that a three-judge court be convened in accordance with section 266 of the Judicial Code, to grant the interlocutory relief prayed for (See Complaint).

8. Jurisdiction of the District Court to entertain the cause was based not only on section 266 of the Judicial Code, but also on the provisions of section 24, par. 14 of the Act of March 3, 1911 (c. 231, 36 Stat. 1092, 28 U. S. C. A. section 41 (14)), which confers jurisdiction over suits brought under the Civil Rights Act (sec. 1, Act of April 20, 1871, c. 22, 17 Stat. 13, 8 U. S. C. A., sec. 43), and sec. 24, par. 8 of the Act of March 3, 1911 (c. 231, 36 Stat. 1092), as amended (28 U. S. C. A. sec. 41 (8)), which grants jurisdiction of suits and proceedings arising under any law regulating commerce.

9. Plaintiffs claimed that the provisions of the challenged State statute violated the Constitution and Laws of the United States by denying them and the members of the union the right of free speech, petition and assembly, and the right peacefully to picket, strike and to bargain

collectively;[6] by imposing involuntary servitude upon them and the members of the Union;[7] and by denying them due process of law, the equal protection of the laws and the privileges and immunities guaranteed them by the Constitution.[8] The statute was also challenged on the ground that it denied plaintiffs and the members of the union of

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[6] Plaintiffs contended that: (1) These rights are protected by the First and Fourteenth Amendments to the Federal Constitution from abridgement by the State, relying upon the following authorities, among others:

PICKETING: *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Milkwagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 293; *American Federation of Labor* v. *Swing*, 312 U. S. 321.

THE RIGHT TO STRIKE AND COLLECTIVE BARGAINING: *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 251; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 196; *Stapleton* v. *Mitchell*, 60 F. Supp. 51, 61, (D. C. Kans.); *Carpenters' Union* v. *Citizens' Committee*, 333 Ill. 225; *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1; *Lindsay* v. *Montana Federation of Labor*, 37 Mont. 264.

(2) The statutory prohibitions against the exercise of these rights cannot be sustained on the theory that there can be no strike against the State or that this was a strike against the State, relying upon the following authorities, among others: *Ziskind, 1000 Strikes of Government Employees*, pp. 233, 234, 251 (*Columbia University Press 1940*); *Agger, The Government and its Employees*, 47 Yale Law Journal 1109; *Arthur V. Oakes*, 63 Fed. 310; *United States* v. *Kane*, 23 Fed. 748; *Board of Trustees of Public Affairs of Village of Celina, Ohio* v. *Now*, 9 L. R. R. Man. 789.

(3) The statutory prohibitions against the exercise of these rights cannot be justified on the theory of grave and immediate danger to the public, relying upon the following authorities, among others: *Mugler* v. *State of Kansas*, 123 U. S. 623; *Schneider* v. *Irvington*, 308 U. S. 147; *Duncan* v. *Kahanamuku*, 327 U. S. 304 (concurring opinions of Chief Justice Stone and Mr. Justice Murphy); *West Virginia* v. *Barnette*, 319 U. S. 624; *Bridges* v. *California*, 314 U. S. 252, 261-263.

[7] Plaintiffs relied on the Thirteenth Amendment to the Constitution and the following authorities, among others: *Bailey* v. *Alabama*, 219 U. S. 219; *Taylor* v. *Georgia*, 315 U. S. 25; *Pollock* v. *Williams*, 322 U. S. 4; *The Peonage cases*, 123 Fed. 675; *Lindsay* v. *Montana Federation of Labor*, 37 Mont. 264; *New Jersey Painting Co.* v. *Local No. 26*, 96 N. J. Eq. 632; *United States* v. *Petrillo*, 68 Fed. Supp. 845, 849, reversed on other grounds, 91 L. Ed. (Adv.) 1403; *Henderson* v. *Coleman* (not officially reported), 7 So. (2d) 117 (Fla.); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Association of North America*, 274 U. S. 37 (dissenting opinion by Justices Brandeis and Holmes).

[8] Plaintiffs relied upon Section 2 of Article 4 and Section 1 of the 14th Amendment of the Constitution, and the following authorities: *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445.

the equal protection of the laws, by depriving them of the freedom to have access to the courts to redress wrongs under unconstitutional statutes without being fettered with severe, exorbitant and cumulative fines and penalties;[9] that its compulsory arbitration provisions deprived plaintiffs and members of the union of their liberty to contract, and of their property, without due process of law;[10] that it was an *ex post facto* law, and a bill of attainder;[11] and that it violated the Supremacy and Commerce clauses of the Constitution and impinged upon a field preempted by the following Federal statutes: The National Labor Relations Act (Act of July 5, 1935 c. 372, 49 Stat. 440, 29 U. S. C. A. secs. 151, 157, 163), the Norris LaGuardia Act (Act of March 23, 1932, c. 90, 47 Stat. 70, 29 U. S. C. A. sec. 102), and the Federal Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, 47 U. S. C. A. sec. 151).[12]

10. Plaintiffs also charged that the challenged statute, on its face and as applied to them, and the threats and acts

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[9] Plaintiffs relied upon Section 1 of the 14th Amendment of the Constitution and the following authorities, among others: *Ex parte Young*, 209 U. S. 123; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U S. 340, 348; *Harrison* v. *St. Louis E. F. R. Co.*, 232 U. S. 318, 328; Footnote 46 *L. R. A.* (N. S.) 1039.

[10] Plaintiffs relied upon Section 1 of the 14th Amendment to the Constitution and the following authorities among others: *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 534, 267 U. S. 552, 559; *Coppage* v. *Kansas*, 236 U. S. 1; *Dorchy* v. *Kansas*, 264 U. S. 286; *St. Louis I. M. & S. R. Co.* v. *Williams*, 49 Ark. 492; *Re Compulsory Arbitration*, 9 Colo. 629; *Re People ex rel. Baldwin* v. *Haws*, 37 Barb. (N. Y.) 440; *Cutler & Hinds* v. *Richley*, 151 Pa. St. 195.

[11] Plaintiffs relied upon Section 10 of Article 1 of the Constitution and the following authorities, among others: *Calder* v. *Bull*, 3 Dall. (U. S.) 386; *Re Garland*, 4 Wall (U. S.) 333; *Malloy* v. *South Carolina*, 237 U. S. 180; *Duncan* v. *Missouri*, 152 U. S. 377; *Cummings* v. *Missouri*, 71 U. S. 277; *Fletcher* v. *Peck*, 6 Cranch (U. S.) 87; *Hawker* v. *State of New York*, 170 U. S. 189.

[12] Plaintiffs relied upon Section 8 of Article 1 and Article 6 of the Constitution and the following authorities among others: *Bethlehem Steel Company* v. *New York State Labor Relations Board*, 91 L. Ed. (Adv.) 887; *Hill* v. *Florida*, 325 U. S. 538; *Hamilton* v. *National Labor Relations Board*, 160 F. (2d) 465 (C. C. A. 6).

of the defendants and their agents, threatened to cause plaintiffs imminent and irreparable injury calling for immediate equitable injunctive relief.

Temporary Restraining Order.

11. On April 15, 1947, after notice to defendants and after extensive argument of counsel for plaintiffs and the Attorney General, lasting almost ten hours, District Court Judge Fake filed an opinion (reported in 71 Fed. Supp. 681) sustaining plaintiffs' motion for a temporary restraint in which he found that:[13]

> "* * * if the statute complained of is eventually found to be invalid the unions and the strikers here will suffer an *irreparable injury* by the continued enforcement of the State statute. At this moment they are confronted not only with the hazards of arrest but with a multiplicity of suits tending to destroy the union. In weighing the equities and inconveniences involved, I take notice of the fact that the pending strike has not impeded official calls, or private emergency calls, so the problem narrows down to a consideration of private and individual inconveniences on the one side and the heretofore recognized right of the strikers on the other * * *". (Italics supplied.)

12. The temporary restraining order, which was issued on April 15, 1947, as amended on April 18, 1947, required all of the defendants below to hold in *status quo* the criminal and civil proceedings against plaintiffs and enjoined them from instituting further civil or criminal actions under the

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[13] The Court relied on and cited *A. F. of L.* v. *Watson*, 327 U. S. 582; *Stapleton* v. *Mitchell*, 60 F. Supp. 51. See also *Modern Woodmen of America* v. *Casados*, 15 F. Supp. 483 (Dist. Ct. N. Mexico).

statute until the further order of the court. The order, however, permitted arbitration under the statute, without prejudice to plaintiffs' rights asserted in said proceedings.[14]

13. By the order of April 15, 1947 Judge Fake called to his assistance, to hear and determine plaintiffs' application for an interlocutory injunction, the Honorable John Biggs, Jr., Senior Judge of the United States Circuit Court of Appeals for the Third Circuit, and the Honorable Thomas F. Meaney, Judge of the District Court.

Attorney General's Action in Court of Chancery of New Jersey.

14. On April 18, 1947, five days before the hearing on the interlocutory injunction, the Attorney General, assuming to act for the State, filed a bill of complaint in the Court of Chancery of New Jersey against the plaintiffs in this cause and the New Jersey Bell Telephone Company, as defendants, in which he prayed, among other things, for declaratory relief as to the validity of the Governor's seizure and the constitutionality of the challenged statute and proceedings taken thereunder, and for an injunction restraining plaintiffs from interfering with the operation of the utility. In his bill, he prayed for a preliminary injunction *against himself, the Commissioner of Labor,* and all law enforcement officers of the State enjoining them from continuing or instituting enforcement proceedings under the statute pending the determination by the Court of Chancery of its constitutionality.[15]

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[14] This was provided for in the amending order of April 18, 1947.

[15] There is no statute in New Jersey authorizing the Attorney General to bring an action to restrain himself from enforcing the criminal laws of the State. Also, when the Chancery bill of complaint was filed, there

15. The following day, without notice to plaintiffs herein, and without affording them an opportunity to be heard, the New Jersey Chancellor, at Trenton, granted the Attorney General's *ex-parte* application and issued the preliminary injunction prayed for, *even though the persons restrained—the Attorney General and the Commissioner of Labor—were not parties to the suit and no final relief of any sort was prayed against them.* This *ex-parte* preliminary injunction was not as broad in scope as the relief prayed for by the plaintiffs in their application for an interlocutory injunction in the District Court.

Stay Order and the Opinion of the District Court.

16. At the hearing on plaintiffs' application for an interlocutory injunction, held on April 23, 1947, the Attorney General moved for a stay of further proceedings before the three-judge court, under Section 266 of the Judicial Code, as amended, on the basis of the Chancery action and the *ex-parte* preliminary injunction issued therein.

17. Section 266, as amended, after providing for a hearing by a three-judge court on an application for an interlocutory injunction to enjoin the enforcement of an unconstitutional State statute, provides:

> "* * * if before the final hearing of such application a suit shall have been brought in a court of the State *having jurisdiction thereof under the laws of such State, to enforce such statute* or order, *accompanied by a stay in such State Court of proceedings*

was no State Statute authorizing a suit to restrain interference with the Governor's possession of the utility. Four days after the suit was filed the Legislature enacted Chap. 75, P. L. 1947, Sect. 11 of which purported to authorize such proceedings. But, as hereinafter shown, under the New Jersey Constitution, the Legislature could not confer such authority on the Court of Chancery.

under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the Attorney General of the State, that the suit in the State courts is not being prosecuted with diligence and good faith." (Italics supplied).

18. Plaintiffs continued to press their motion for an interlocutory injunction. At the hearing, they introduced witnesses who were examined and cross examined. Extensive arguments were had and briefs were filed on the merits of the plaintiffs' case as well as on the defendants' motion for a stay. Upon consent of the parties, the Court ruled that, if the stay moved for by the Attorney General were denied, the case would be disposed of as if on final hearing, and a final decree would be entered. Judge Fake's temporary restraining order was continued until the further order of the Court.

19. On July 3, 1947, the three-judge Court filed its opinion granting the defendants' motion for a stay of proceedings pending the determination of the suit in the State Court of Chancery.

20. In its opinion[16] (Appendix E, *infra*), the Court recognized that "the reach of the New Jersey Act is indeed broad"[17] and that the Chancery action and P. L. 1947, Chapter 75, were "anomalous" in many respects,[18] but it never-

[16] 72 Fed. Supp. 499.
[17] Page 62, *infra*.
[18] Pages 59, 60, *infra*.

theless held that it was required to stay further proceedings in the District Court under section 266 of the Judicial Code. In so holding, the Court refused to follow a decision of the highest court of the State of New Jersey and three decisions of three-judge District Courts of coordinate jurisdiction and equal dignity, sustaining the plaintiffs' objection to the stay, thus creating at least four conflicts of law.

21. The District Court, in its opinion, overruled plaintiffs' contentions that the Chancery suit and *ex parte* preliminary injunction did not satisfy any of the statutory prerequisites for such a stay. Plaintiffs had contended that the stay should not issue because:

(1) The Court of Chancery was without jurisdiction to enjoin criminal prosecutions and actions for the collection of statutory penalties.

(2) The bringing of the Chancery action and the Chancery preliminary injunction were not authorized by the laws of the State of New Jersey.

(3) The Chancery action was not one "to enforce" the statute under challenge, within the meaning of section 266 of the Judicial Code.

(4) The Chancery action was not accompanied by a stay of all proceedings under the challenged statute, and the Chancery injunction was not as broad in scope as the interlocutory relief which was prayed for in the District Court.

(5) The action in the State Court was *not* a *bona fide* suit involving a genuine controversy so far as it related to the injunction sought and granted therein.

(6) The Chancery action was filed and the accompanying injunction obtained *after* the entry of the temporary restraining order in the District Court.

On October 2, 1947, the Court entered an order granting a stay in accordance with its opinion and made its opinion its Findings of Fact and Conclusions of Law.

22. True copies of the following orders and opinions referred to in this petition, are hereto annexed and made a part hereof:

(1) Opinion of District Judge Fake delivered April 15, 1947, and filed April 18, 1947 (Appendix A, p. 42).

(2) Temporary restraining order issued by Judge Fake on April 15, 1947 (Appendix B, p. 46).

(3) Amendment to order dated April 15, 1947, filed April 18, 1947 (Appendix C, p. 50).

(4) Preliminary injunction issued by Court of Chancery of New Jersey on April 19, 1947 (Appendix D, p. 51).

(5) Opinion of Three-Judge District Court filed July 3, 1947 (Appendix E, p. 53).

(6) Order of Three Judge Court staying proceedings in District Court filed October 2, 1947 (Appendix F, p. 64).

IV. Substantial Questions Involved.

23. The following substantial questions are involved in this ~~appeal~~ case:

(1) May a District Court stay proceedings therein to enjoin the enforcement of an allegedly unconstitutional

State statute under section 266 of the Judicial Code, without *affirmatively finding* that the action in the State Court and the injunctive order granted therein satisfied all of the statutory prerequisites for a stay under that section?

(2) May a District Court abdicate its judicial function and relegate to the State courts the determination of the question whether a prerequisite for a stay under Section 266 has been satisfied, as for example, whether the State Court has jurisdiction over a suit before it and to issue an injunction such as Chancery issued in this case; may it do so in the face of governing decisions on that question by the highest Court of the State; and is the District Court required to follow and apply such decisions?

(3) May a District Court stay proceedings pending therein under Section 266 merely because a State court has issued an injunction restraining enforcement of a State statute where the State court has no fundamental jurisdiction to issue such injunction?

(4) Is the requirement of Section 266 that the State court have jurisdiction, satisfied by the tenuous jurisdiction (which the District Court assumed that Chancery possessed) to grant an injunction to maintain the *status quo* of an action before it, even though it lacks fundamental jurisdiction to grant such an injunction on final hearing?

(5) Under Section 266, may the Attorney General of New Jersey file, and may the State Court of Chancery entertain, a suit for an injunction restraining the enforcement of a state criminal statute, alleged to be unconstitutional, in the absence of a State statute conferring such power upon the Attorney General and such jurisdiction upon the State Court?

(6) Was the Chancery action one "to enforce" the challenged statute within the meaning of Section 266 of the Judicial Code?

(7) May Section 266 be invoked where, as here, the State Court injunction does not stay all proceedings under the challenged statute and is not as broad in scope as the interlocutory relief for which the plaintiffs prayed in their complaint in the District Court?

(8) Is the Chancery action a *bona fide* suit involving a genuine controversy insofar as it relates to the injunction granted therein?

(9) May the stay provisions of Section 266 of the Judicial Code, be invoked where the State court suit is filed and the accompanying State court injunction is obtained *after* the entry of a temporary restraining order in the Federal Court?

(10) Under the circumstances of this case, should not the District Court have proceeded to determine the case on the merits?

V.

Errors Committed by the District Court.

(1)

The Court erred in issuing the stay order without affirmatively finding that the Chancery action and the injunction issued therein, satisfied all the statutory prerequisites for a stay under Section 266.

24. The District Court made no affirmative findings with respect to the following two prerequisites to the exercise of its jurisdiction to grant a stay: (1) that the Court

of Chancery had jurisdiction to entertain the Chancery action and to issue the preliminary injunction, and (2) that that action was *bona fide* and involved a genuine controversy. It concluded merely that "we cannot hold * * * that the Court of Chancery was without power * * *" and that "we cannot believe that the Court of Chancery issued a frivolous order",[19] and assumed the existence of such jurisdiction and the genuineness of the suit merely from the circumstance that the Chancery injunction issued.

It is respectfully submitted that the District Court had no jurisdiction to order a stay of proceedings under section 266 without making such affirmative findings. See *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 188-190.

(2)

The Court erred in relegating to the Court of Chancery the determination of federal questions which it itself was under a plain legal duty to determine, particularly in view of governing decisions on the questions by the highest Court of the State.

25. The District Court left to the Chancery Court the determination of the questions of the jurisdiction of the Chancery Court and the genuineness of the Chancery action despite the fact that there were governing State court decisions on these questions. This was error, for the District Court itself was under a duty to decide such questions, even though they involved a determination of State law. *Irving Trust Co.* v. *Day*, 314 U. S. 566, 561-562; *American Surety Co.* v. *Bethlehem National Bank*, 314 U. S. 314, 316. It may not relegate such questions to the State courts for determination. See *Hillsborough Township* v. *Cromwell*, 326 U. S.

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[19] Pages 57, 60, *infra*.

620; *Corporation Commission of Oklahoma* v. *Cary*, 296 U. S. 452; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 618; *Meredith* v. *Winter Haven*, 320 U. S. 228.

Nor may the District Court, in deciding questions of State law, ignore an authoritative interpretation of local law established by the highest court of the State (*Hillsborough Township* v. *Cromwell, supra; Dohany* v. *Rogers*, 281 U. S. 362), merely because an inferior State tribunal—here the Court of Chancery—has done so in issuing the preliminary injunction. See *Moores* v. *Citizens Nat. Bank*, 104 U. S. 625; *Vanderbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 543.

In the instant case, the District Court refused to follow the decision of the New Jersey Court of Errors and Appeals in *Moresh* v. *O'Regan*, 122 N. J. Eq. 388, which held that Chancery has no jurisdiction to enjoin criminal prosecutions or actions for the collection of statutory penalties, either inherently or under the New Jersey Declaratory Judgment Act, and that, under the New Jersey Constitution, the Legislature cannot confer such jurisdiction on that court. In so holding, the Court of Errors and Appeals merely followed the State Constitution which protects the historical separation of the jurisdiction of law and equity from encroachment by the Courts or the Legislature, and prohibits the courts and the Legislature from stripping any of the constitutional courts—in the *Moresh* case and in the instant case, the law courts—of jurisdiction conferred upon them by the State Constitution. *Weiss* v. *Levine*, 133 N. J. Eq. 441 (Ch.); *Flanigan* v. *Guggenheim*, 63 N. J. L. 647 (E. & A.); *Hedden* v. *Hand*, 90 N. J. Eq. 583 (E. & A.).

The subject of the genuineness of the Chancery action is treated in paragraph 32 *infra*.

(3)

The Court erred in issuing the stay order merely because the Court of Chancery had issued the injunction.

26. The District Court did not pass upon the question of Chancery jurisdiction, to issue the injunction. In disposing of petitioner's argument on this point the Court said: "But the short answer to the plaintiff's assertion is that an injunction did issue from the Court of Chancery * * *" (p. 58, *infra*).

We respectfully submit that the mere fact that the Court of Chancery issued the injunction is not proof that it had jurisdiction to do so. Unless Chancery possesses such jurisdiction, "this is not a case for which the procedural structure" of the stay provisions of Section 266 was devised, and the stay order could not issue. *Phillips* v. *United States*, 312 U. S. 246, 253. See also *Frieberg Co.* v. *Dawson*, 274 Fed. 420, (D. C. Ky.), aff'd. *sub nom. Dawson* v. *Frieberg Co.*, 255 U. S. 288.

(4)

The Court erred in holding that the requirement of Section 266 that the State Court have jurisdiction is satisfied by the tenuous jurisdiction (which the District Court assumed that Chancery possessed) to grant an injunction to maintain the *status quo* of an action before it, even though it lacked the fundamental jurisdiction to grant such an injunction on final hearing.

27. The District Court recognized that, under *Moresh v. O'Regan*, 122 N. J. Eq. 388, Chancery had no jurisdiction to enjoin criminal prosecutions or to grant declaratory relief with respect to the challenged criminal statute, either under its inherent authority or under the New Jersey De-

claratory Judgment Act. The Court reasoned, however, that, even though such fundamental jurisdiction were lacking, Chancery had the power to issue the preliminary injunction to maintain the *status quo* of the action before it, by analogy to the doctrine established by *United States* v. *United Mine Workers of America,* 330 U. S. 258.[20] But the law of New Jersey is in conflict with that laid down in the *Mine Workers* case. In New Jersey an order issued by a court without jurisdiction is absolutely void and may be disregarded with impunity. Such an order is not valid for any purpose. *Dodd* v. *Una,* 40 N. J. Eq. 672; In *Re Roberts,* 133 N. J. Eq. 122.

Moreover, the *Mine Workers* case is not at all analagous to the case at bar. There, the restraint was a *temporary restraining order* against the *defendants* therein, and was required to maintain the *status quo* in the action before the court. In the case at bar, however, the Chancery suit was brought for the purpose, among others, of restraining the petitioners herein from interfering with the State's operation of utility. But the Chancery *preliminary injunction* was not against petitioners—the defendants in that action; it was against *third persons—the Attorney General and the Commissioner of Labor—who were not even parties thereto,* who were already subject to a similar restraint issued by the Federal Court, and with respect to whom there was no issue involved in the suit or *status quo* to maintain. Again, in the *Mine Workers* case, this Court expressly limited its holding to a case where the question of jurisdiction was substantial, not frivolous. In the instant case, it is clear under the decisions of the courts

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[20] Page 58, *infra.*

of the State, that the Court of Chancery had no jurisdiction to issue the injunction.

But even assuming that the doctrine of the *Mine Workers* decision is applicable to the case at bar, it is respectfully submitted that the kind of tenuous jurisdiction there involved is not the kind of jurisdiction over the subject matter which is contemplated by the stay provisions of Section 266.

(5)

The Court erred in holding that the State Attorney General may file and the State Court of Chancery may entertain a suit for an injunction restraining the enforcement of a State Criminal or Penal Statute in the absence of a State Statute conferring such power upon the Attorney General and such jurisdiction upon the Court of Chancery.

28. An eminent legal authority has stated that in order to comply with the requirements for a stay under Section 266, the institution of the State Court suit and the issuance of the State Court injunction must be *expressly* authorized by statute. *Welsh Pogue, "State Determination of State Law,"* 41 Harvard L. Rev. 623, 635. This Court has cited that article with approval. *Phillips* v. *United States*, 312 U. S. 246, 250. Moreover, this Court has stated that proceedings may be stayed under Section 266 *"if appropriate provision is made for testing"* the validity of the challenged State statute. *Phillips* v. *United States, supra*, at 253. And it is significant that at least four states (Arizona, Nebraska, New York and Wisconsin) have adopted the necessary enabling statutes. Legis. (1937) 54 Har. L. Rev. 813, 819 N. 27; 78 Cong. Rev. 2016 (1934); Note (1941), 50 Har. L. Rev. 1379, 1382.

New Jersey has no "appropriate" statutory "provision" authorizing the Attorney General to file, or the State Court of Chancery to entertain, a suit for an injunction restraining the enforcement of a State criminal or penal statute. The District Court erroneously held that such statutory authority was not required, relying on cases which are not apposite and expressly refusing to follow *Pogue, supra* (pp. 58-59, *infra*).

(6)

The Court erred in holding that the Chancery action was one "to enforce" the challenged statute within the meaning of Section 266.

29. The District Court held that the Chancery suit could be regarded as one "to enforce the statute", within the meaning of Section 266, even though it conceded that it was "anomalous" for Chancery to aid the Attorney General and the law enforcement officers of the State by the injunctive process, in their duty to enforce a criminal law.[21]

30. In so holding the Court manifestly erred. The Chancery action has two aspects: (1) it seeks to have the challenged statute declared constitutional and to enjoin the Attorney General and the Commissioner of Labor from enforcing the statute pending the determination of its constitutionality so that the Federal Court would be ousted of jurisdiction. Obviously such a suit is *not* one to *enforce* the challenged statute. Rather, it is one to *restrain its enforcement*. (2) The suit also seeks to enjoin allegedly tortious conduct—plaintiffs' alleged interference with the operation of the utility seized by the Governor. The Chan-

[21] Pages 59-60, *infra*.

cery bill of complaint (par. 27) states that the State is invoking "the general equity powers of the Court because of the wrong being suffered by the State." When equity restrains such conduct, even though criminal, it does so not because it is criminal, but because it is tortious, and because other requisites of equity jurisdiction are present—*e. g.*, irreparable injury. It does not punish the defendant for the commission of the crime; that is left to the criminal courts. In fact, the Court of Chancery has no jurisdiction under the State Constitution to "enforce" a criminal or penal statute. This is the function of the law courts. *McMillan* v. *Keuhnle,* 78 N. J. Eq. 251; *Green* v. *Piper,* 80 N. J. Eq. 288; *Ocean City Ass'n.* v. *Schurch,* 57 N. J. Eq. 268.

(7)

The Court erred in holding that the Chancery injunction complied with Section 266 even though it did not stay all proceedings under the challenged statute and was not as broad in scope as the interlocutory relief for which the petitioners prayed in their complaint in the District Court, thus creating a conflict with the decision in *Northwestern Bell Telephone Co.* v. *Hilton,* 274 Fed. 384.

31. The District Court held that the Chancery injunction satisfied the requirements of section 266 in this respect.[22] But one of the proceedings under the State statute which petitioners challenged as unconstitutional in the District Court is that requiring compulsory arbitration.[23] The complaint in the Federal suit prays for an injunction against the enforcement of those provisions. It is to be noted, however, that the Chancery injunction does not stay proceedings

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[22] Page 60, *infra.*

[23] Complaint, para. 19.

under the arbitration sections. On the contrary, it expressly excepts them from the restraint.

In addition, the Chancery injunction does not enjoin the Governor of the State, whereas petitioners sought injunctive relief against him in the District Court.

"Congress could not have intended to oust the jurisdiction of the federal courts, excepting where the state courts were providing an adequate substitute." *Frieberg Co.* v. *Dawson,* 274 Fed. 420, 427, affirmed *sub nom Dawson* v. *Frieberg Co.,* 255 U. S. 288.

The District Court expressly refused to follow the decision of the three-judge court in *Northwestern Bell Telephone Co.* v. *Hilton,* 274 Fed. 384, on this point, and thus created another conflict (p. 60, *infra*).

(8)

The Court erred in assuming that the Chancery action was a *bona fide* suit involving a genuine controversy insofar as it relates to the injunction granted therein, thus creating a conflict with the decision of *Peltason, Tenenbaum & Harris, Inc.* v. *Refunding Board of Arkansas,* 16 F. Supp. 179.

32. The Chancery bill does not allege any cause of action against the Attorney General or the Commissioner of Labor, the persons enjoined therein, does not make them parties to the suit, and does not pray for final relief against them. The injunction is, therefore, a nullity and may be so treated in these proceedings. *Munday* v. *Vail,* 34 N. J. L. 418; *Reynolds* v. *Stockton,* 140 U. S. 254; *Hubbard* v. *Montrose Metal Shingle Co.,* 79 N. J. L. 209. Moreover, paragraph 20 of the Chancery bill shows that the Attorney

General voluntarily applied for and submitted to the Chancery injunction; that the application was not an adversary one; and that there was no genuine controversy justifying the injunction. In short, it is obvious that the suit is a sham and fictitious action, a mere strategem brought for the purpose of obtaining the injunction so that the Federal Court would be ousted of jurisdiction. Such a suit is not entitled to recognition by the Courts (*Lord* v. *Veazie,* 8 How. (U. S.) 251; *Chamberlain* v. *Cleveland,* 1 Black. (U. S. 419), nor can it be used as the basis for a stay under section 266. *Peltason, Tenenbaum & Harris, Inc.* v. *Refunding Board of Arkansas,* 16 F. Supp. 179 (D. C. Ark.).

Despite these circumstances, the District Court, instead of independently determining the genuineness of the Chancery action, merely assumed that it was genuine from the circumstance that the Court of Chancery issued the injunction.[24] We submit that that was error.

(9)

The Court erred in holding that the Chancery action and injunction complied with the stay provisions of Section 266, even though the action was filed and the injunction was obtained after the entry of the temporary restraining order in the District Court, thus creating a conflict with the decision in *Union Light, Heat & Power Co.* v. *Railroad Commission,* 17 F. (2d) 143.

33. In the instant case the Chancery action was filed by the Attorney General and the Chancery injunction was obtained *after* the entry of the temporary restraining order issued by Judge Fake. That order restrained the Attorney General from enforcing the statute under attack. Under

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[24] Pages 60-61, *infra.*

the stay provisions of section 266 the suit in the Court of Chancery must be one "to enforce" the statute under attack in the Federal Court. Since the Federal Court had already issued an order restraining the Attorney General from enforcing the statute under attack, it would be a contempt of court for the Attorney General to bring a subsequent suit, as here, in a State court to enforce the very same statute which the Federal Court restrained him from enforcing.

Nevertheless the District Court held that the Chancery action satisfied the requirements for a stay under Section 266.[25] Such a construction of Section 266, if allowed to stand, will encourage State officials to commit contempts against Federal Courts. Congress could have had no such intent. Obviously, the stay provisions of Section 266 were intended to apply only to situations where prior to the hearing on the interlocutory injunction, no temporary restraining order has been issued, and the State court action is not instituted in defiance of such a restraint. This was so held in *Union Light & Power Co.* v. *Railroad Commission*, 17 F. (2d) 143, which, though cited with approval in *Peltason, Tenenbaum & Harris, Inc.* v. *Refunding Board of Arkansas*, 16 F. Supp. 179, the District Court expressly refused to follow, thus creating another conflict.

(10)

The Court erred in not deciding the merits of the case before it.

34. The District Court held that it "must stay its hand unless and until the State tribunal should declare itself to be without power to determine the issues" (p. 62, *infra*).

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[25] Page 61, *infra*.

In granting the stay, the District Court relied, in part, upon the case of *A. F. of L.* v. *Watson*, 327 U. S. 582. But that case is not in point. Section 266 gives no discretion to the District Court. If the statutory prerequisites for a stay are satisfied, the Court must issue the stay; if one or more of such prerequisites is lacking, the stay may not issue. *The District Court did not assume to exercise any discretion, but made the order because it believed it was compelled to do so by Section 266.* The *Watson* case did not involve a motion for a stay under Section 266. It merely held that a Federal Court, *in the exercise of its discretion* may withhold a decision on the merits of a case involving an allegedly unconstitutional State law, where the meaning and application of such law is ambiguous and doubtful. In such circumstances, it was held, the District Court may hold the bill pending a resolution of the ambiguities by the State courts.

In the instant case, the State statute under challenge is plain and unambiguous on its face, is clearly applicable, and has been applied to plaintiffs, and does not require any construction or interpretation by the State courts before its constitutionality may be determined.

VI.

Reasons for Allowance of the Writ.

35. It is believed that the instant case is the first reported case in which a Federal three-judge court has granted such a stay of proceedings, and that the case raises, for the first time, the question of the conditions precedent

which must be satisfied to warrant a stay of proceedings under section 266.

36. The proper determination of the foregoing questions is a matter of grave public importance. It not only substantially affects petitioners' rights but also goes to the very heart of the effective administration of Section 266 of the Judicial Code.

37. The construction of the stay provisions of section 266 adopted by the District Court, if allowed to stand, will completely emasculate section 266, as well as other Federal Statutes, including the Civil Rights Act (8 U. S. C. A. sec. 43) and the acts conferring jurisdiction on the District Courts over civil rights cases (28 U. S. C. A. sec. 41 (14)) and cases arising out of laws regulating commerce (28 U. S. C. A. sec. 41 (8)), insofar as suits to restrain the enforcement of unconstitutional State statutes are concerned, and will thus do violence to the Congressional policy evident in those statutes. It will have a most profound adverse effect upon civil rights controversies, and will deprive labor and others, whose constitutional rights are invaded, of a Federal judicial forum. For, under the District Court's construction, any suit and restraint in a State court may result in a stay of Federal court proceedings under section 266, no matter how sham, frivolous, or collusive such suit may be, and even though the State court has no jurisdiction to entertain the suit or to enter an order restraining the enforcement of the challenged State statute. The District Court's decision, if allowed to stand, will provide an easy road to the abdication by the Federal courts of their judicial functions to the State courts. Moreover, as already indicated, the decision of the District Court conflicts with

the controlling decisions of the highest courts of New Jersey and with decisions of other three-judge District Courts.

38. If this Court determine that it has no jurisdiction to entertain the pending direct appeal from the stay order complained of, then, unless the writ of mandamus or certiorari prayed herein is granted, petitioners will be denied a decision by this Court on the foregoing substantial issues relating to the proper interpretation and administration of section 266 of the Judicial Code.

39. The order of the District Court, if allowed to stand, will prevent this Court from fully exercising its appellate jurisdiction and will seriously impair, if not defeat, its power of review of meritorious questions arising in cases instituted under Section 266 of the Judicial Code, and the other statutes referred in paragraph 37, to enjoin the enforcement of unconstitutional State statutes.

40. Where, as here, the District Court has acted erroneously and outside of its jurisdiction and has stayed a pending cause without legal warrant, and has refused to decide the merits, this Court undoubtedly has the power to protect its appellate jurisdiction by the issuance of a writ of mandamus or certiorari. *McClellan* v. *Carland,* 217 U. S. 268; *Roche* v. *Evaporated Milk Ass'n.,* 319 U. S. 21, 24-26; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10; *Ex Parte Public National Bank,* 278 U. S. 101; *Ex Parte United States,* 319 U. S. 730; *Ex Parte Republic of Peru,* 318 U. S. 578, 582-585; *In Re National Labor Relations Board,* 304 U. S. 486; *DeBeers Consol. Mines* v. *U. S.,* 325 U. S. 212; *U. S. Alkali Exp. Ass'n.* v. *United States,* 325 U. S. 196; *Ex Parte Chetwood,* 165 U. S. 443, 462; *Barber Asphalt Paving Co.* v. *Morris,* 132 Fed. 945 (C. C. A. 8th).

41. For the foregoing reasons, it is respectfully submitted that such questions should now be resolved by this Court, by bringing the instant case up for review through the issuance of either a writ of mandamus, or, in the alternative, a writ of certiorari, in the event this Court determines that an appeal under Section 266 of the Judicial Code does not lie.

WHEREFORE petitioners respectfully pray:

1. That a writ of mandamus issue from this Court directing and commanding the Honorable John Biggs, Jr., Judge of the United States Circuit Court of Appeals for the Third Circuit and the Honorable Guy L. Fake, and Honorable Thomas F. Meaney, Judges of the District Court of the United States for the District of New Jersey:

(a) to vacate the order dated October 2, 1947 staying proceedings in the case of *Traffic Telephone Workers' Federation of New Jersey, et al.* v. *Alfred Driscoll,* Governor of the State of New Jersey, *et al.,* now pending before them (Civil Action No. 10064); and

(b) with all convenient speed, to determine the said cause on the merits, and to render judgment accordingly; *or, in the alternative,—*

2. That a writ of certiorari issue from this Court to the United States District Court for the District of New Jersey, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings in said action; that the order of the District Court entered October 2, 1947 be reversed by this Honorable Court, and that the said District Court be directed with all

convenient speed, to determine the said cause on the merits and to render judgment accordingly.

3. That this Court grant petitioners herein such other and further relief as may be just and proper in the premises.

ISRAEL B. GREENE,
Attorney for Petitioners,
1180 Raymond Boulevard,
Newark, N. J.

Affidavit of Henry Mayer.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.:

HENRY MAYER, of full age, being duly sworn according to law, upon his oath, deposes and says:

I am a member of the New York Bar and am the general counsel of the petitioners named in the foregoing petition. I have read the foregoing petition and know the contents thereof, and I am familiar with the proceedings in the District Court of the United States for the District of New Jersey, to which reference is made in said petition, because I participated therein.

The statements of fact contained in the foregoing petition are true to the best of my knowledge, information and belief.

HENRY MAYER.

Sworn and subscribed to before me this 7th day of November, 1947.

MARY E. CRUISE,
Notary Public of New Jersey.

(Notary Seal Affixed)

APPENDIX A.

Opinion of District Court Judge Guy L. Fake on which Temporary Restraining Order was based, delivered April 15, 1947, filed April 18, 1947, reported in 71 F. Supp. 681 (pp. 192-197, Transcript of Hearing of April 15, 1947).

The Court (Orally, at close of hearing): This is an application for a temporary restraining order pending the convening of a three-judge court to pass upon the validity of a New Jersey statute hearing upon labor disputes. The court convenes pursuant to Title 28 U. S. C. A. 380, Judicial Code 266.

Under this statute I am authorized to grant the temporary relief sought if the necessary requirements are met. In this connection there are two major problems to be considered.

The first bears upon the question as to whether or not it appears on the face of the record before me that something more than a mere capricious or wholly unreasonable attack is made upon the State statute. It is not for me at this time to deal with the ultimate question of validity. It is sufficient for present purposes if the record presents a justiciable issue. It appears that issues are raised bearing upon involuntary servitude said to be in conflict with the 13th amendment to the United States Constitution. Freedom of speech and peaceable picketing are also involved. An issue is also raised as to the extent of the police power of the State to pass an act in conflict with the National Labor Relations Act. So also a nice question looms up in the offing as to whether the State enjoys immunity as does the Federal Government from the spirit of the Norris-LaGuardia and the Clayton Acts in so far as injunctive relief is concerned. There are other issues as well but those

above mentioned indicates the far-reaching seriousness of the basic issues. They indicate that something considerably more than a frivolous attack is to be met when the three-judge court convenes.

The second major factor bears upon a weighing of the inconveniences. In this connection the equitable approach is suggested in a Federal statute which provides "That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief." Here I look into the situation as it now prevails throughout the State. Private business is seriously impeded by a total failure of telephone service. Picket lines are established to prevent either the State or the Telephone Company from furnishing service to private users. In the event of the validity of the statute, these pickets and their aiders and abetters are laying themselves liable to criminal prosecutions and continuing daily penalties of at least $250.00 each, while the unions themselves are subject under the statute to penalties of $10,000 for each day the strike continues with their connivance.

Whether I like it or not this Court is bound by the statutory and case law as it is written. In the Federal sphere peaceful strikes are validated by statute and as well by case law. Thus the Clayton Act provides that this Court shall not function to * * * prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do. In *American Federation of Labor* vs. *Watson*, 327 U. S. 582 the Supreme Court deals with one of the rights of organized labor as follows: "It is fair to say on a reading of the bill that from the viewpoint both of the appellant unions and the appellant employers the disruption of collective bargaining which would be occasioned by holding closed-shop agreements to measure the

loss in money damages. • • • The loss in bargaining position by the unions, the disruption of harmonious relationships between the union and employers, the almost certain decrease in union membership—these are matters involving intangible values." While I am not now concerned with a closed-shop issue, I am concerned, among other things, with a Federal right to strike and this right falls in the same class as the right to maintain a closed-shop, which the Supreme Court protects as above stated. It follows here that if the statute complained of is eventually found to be invalid the unions and the strikers here will suffer an irreparable injury by the continued enforcement of the State statute. At this moment they are confronted not only with the hazards of arrests but with a multiplicity of suits tending to destroy their union.

In weighing the equities and the inconveniences involved, I take notice of the fact that the pending strike has not impeded official calls, or private emergency calls, so the problem narrows down to a consideration of private individual conveniences on the one side and the heretofore recognized right of the strikers on the other. The answer is found in *Stapleton* vs. *Mitchell*, 60 Fed. Supp. 51, 61 where it is held "The right to peaceably strike or to participate in one, to work or refuse to work and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the State may not condition or abridge in the absence of grave and immediate danger to the community. • • • In this setting we think it is the inherent prohibitions of the statute standing alone which impose the unconstitutional restraint, and *those against whom the statute is plainly directed should not be required to abide the processes of criminal justice in order to obtain the redress to which they are entitled under the Federal constitution.*" This is recited and italicized here not because of its possible bearing on the ultimate question of the validity of the

State statute but because of the weight given to the right involved. I am of the opinion in weighing the equities that the *status quo* should be maintained so far as possible until the question of the validity or constitutionality of said sections of said statute is established one way or the other. It is therefore concluded that the defendants, ALFRED E. DRISCOLL, GOVERNOR OF THE STATE OF NEW JERSEY, WALTER D. VAN RIPER, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, AND HARRY C. HARPER, COMMISSIONER OF LABOR OF THE STATE OF NEW JERSEY, and their agents, servants and employees, and all law enforcement officers of the State of New Jersey, and all persons in active concert and participation with them to be and they are hereby enjoined and restrained as follows:

They shall hold in *status quo* all actions of law or in equity, civil or criminal, now pending in the New Jersey courts and heretofore commenced by them under or pursuant to the terms and conditions of the statute complained of in these proceedings, and they shall take no further or other actions, civil or criminal, in any court in pursuance of said statute except as hereinafter provided, until the further order of this court. Nothing herein contained, however, shall be construed to restrain the defendants above named from proceeding under the arbitration provisions of said statute without prejudice to their rights asserted in these proceedings, the result thereof to abide the final judgment of the Court as to the validity or constitutionality of the said statute, or from instituting such actions or suits as they may be advised are proper under any other statute of the State of New Jersey, or ordinance of any political subdivision thereof.

APPENDIX B.

Temporary Restraining Order, Etc.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY.

TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, an Unincorporated Association, MARY HANSCOM, VIRGINIA WIGGLESWORTH and ELIZABETH RYAN, individually, Plaintiffs, *vs.* ALFRED E. DRISCOLL, Governor of the State of New Jersey, WALTER D. VAN RIPER, Attorney General of the State of New Jersey, and HARRY C. HARPER, Commissioner of Labor of the State of New Jersey, Defendants.	Civil Action No. 10,064. Temporary Restraining Order, Etc.

This matter coming on to be heard on motion of the plaintiffs in the above-entitled cause for an interlocutory injunction against the above named defendants on plaintiffs' complaint duly verified by the affidavits of MARY HANSCOM, VIRGINIA WIGGLESWORTH, ELIZABETH RYAN, HENRY MAYER, CECIL V. ROWE, FLORENCE KERSTEN, DOROTHY SULLIVAN, and ELSIE STETER; and it appearing to the court that said complaint herein seeks an interlocutory injunction restraining the enforcement of certain provisions of an act of the legislature of the State of New Jersey entitled, "AN ACT to amend the title of 'An Act concerning labor disputes in public utilities; providing for collective bargaining; en-

larging the duties of the State Board of Mediation; and providing for seizure and operation of public utilities by the State, approved March twenty-sixth, one thousand nine hundred and forty-six (P. L. 1946, c. 38) so that the same shall read 'An Act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the state; providing for compulsory arbitration of labor disputes in public utilities; and providing penalties for the violation thereof;' and to supplement the body of said act;'' approved April 9, 1947 (P. L., 1947, c. 47) by restraining the action of the defendants, in the enforcement of such provisions of said statute, upon the ground of the unconstitutionality of such provisions of said statute, in accordance with the remedy provided by section 266 of the Judicial Code, 28 U. S. C. A., section 380; and to restrain the defendants from commencing and prosecuting certain criminal and civil proceedings hereinafter mentioned; it is on this 15th day of April, 1947, on motion of ISRAEL B. GREENE, attorney for plaintiffs, ORDERED, ADJUDGED AND DECREED as follows:

1. The Honorable Guy L. Fake, Judge of the United States District Court for the District of New Jersey, hereby calls to his assistance to hear and determine the application for an interlocutory injunction in this cause, the Honorable John Biggs, Jr., Judge of the Circuit Court of Appeals for the Third Circuit, and the Honorable Thomas F. Meaney, Judge of the District Court for the District of New Jersey.

2. It is FURTHER ORDERED, ADJUDGED AND DECREED that the above named defendants appear and show cause, if any they have, on the 23rd day of April, 1947, before said three-judge court to be holden at the Post Office Building, Federal Square, Newark, N. J. at 11 o'clock in the forenoon or as soon thereafter as counsel can be heard, why an interlocutory injunction should not issue as prayed for in said complaint.

3. And the plaintiffs having applied for a temporary restraining order pending their application for an interlocutory injunction; and notice of that application having been given to the defendant, Walter D. Van Riper, Attorney General of the State of New Jersey, as directed by the Court; and parties having been heard; and it appearing from said verified complaint that immediate and irreparable injury, loss, and damage will result to plaintiffs before a hearing had on plaintiffs' application for an interlocutory injunction, and that therefore a temporary restraining order should be issued before the hearing of said application for an interlocutory injunction in that: the plaintiffs and members of the plaintiff Union now on strike may be deprived of their civil rights granted them under the Constitution and laws of the United States; the said strike may be impaired or broken by decimation in the members of the membership of the plaintiff Union with resulting loss in its dues and collective bargaining strength; the plaintiffs and the members of the plaintiffs' Union may be subjected to a multiplicity of civil suits and criminal prosecution which are claimed to amount to a denial of the equal property of the laws,—all of which may occur before the hearing on the plaintiffs' application for an interlocutory injunction.

And the Court being of the opinion in weighing the equities that the *status quo* should be maintained so far as possible until the question of the validity or constitutionality of said sections of said statute is established one way or the other, it is therefore FURTHER ORDERED that the defendants, ALFRED E. DRISCOLL, Governor of the State of New Jersey, WALTER D. VAN RIPER, Attorney General of the State of New Jersey, and HARRY C. HARPER, Commissioner of Labor of the State of New Jersey, and their agents, servants and employees, and all law enforcement officers of the State of New Jersey, and all persons in active concert and participation with them be and they are hereby enjoined and restrained as follows:

They shall hold in *status quo* all actions at law or in equity, civil or criminal, now pending in the New Jersey courts and heretofore commenced by them under or pursuant to the terms and conditions of the statute complained of in these proceedings, and they shall take no further or other actions, civil or criminal, in any court in pursuance of said statute except as hereinafter provided, until the further order of this Court. Nothing herein contained, however, shall be construed to restrain the defendants above named from proceeding under the arbitration provisions of said statute without prejudice to their rights asserted in these proceedings, the result thereof to abide the final judgment of the Court as to the validity or constitutionality of the said statute, or from instituting such actions or suits as they may be advised are proper under any other statute of the State of New Jersey, or ordinance of any political subdivision thereof.

The above restraint is granted upon condition that the plaintiffs first give bond in the sum of Two Hundred Fifty Dollars for the payment of such costs and damages as may be incurred or suffered by any who is found to have been wrongfully enjoined or restrained; and such bond having been tendered and examined by the Court, the same is hereby approved and ordered filed with the Clerk of the Court.

It is FURTHER ORDERED that the foregoing restraints shall remain in force only until the hearing and determination of the application for an interlocutory injunction.

It is FURTHER ORDERED that copies of the complaint filed in this cause and of this order, certified by the Clerk of the Court be served upon the defendants within 3 days from the date hereof.

Issued at 6:45 P. M.
April 15, 1947.

GUY L. FAKE,
Judge.

APPENDIX C.

Amending Order.

(Filed April 18, 1947.)

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY.

TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, an Unincorporated Association, MARY HANSCOM, VIRGINIA WIGGLESWORTH and ELIZABETH RYAN, individually,
Plaintiffs,
vs.
ALFRED E. DRISCOLL, Governor of the State of New Jersey, WALTER D. VAN RIPER, Attorney General of the State of New Jersey, and HARRY C. HARPER, Commissioner of Labor of the State of New Jersey,
Defendants.

Amending Order.
Civil Action
No. 10,064.

On application of Israel B. Greene, Esq., Attorney of plaintiffs, and Attorney General of the State of New Jersey, representing the defendants not objecting,

It is on this 18th day of April, 1947 ORDERED that the order made in this cause on the 15th day of April, 1947 be amended by the insertion therein of the following provision, to wit: "It is further ordered that the plaintiffs may proceed under the arbitration proceedings of such statute without prejudice to their rights asserted in these proceedings the result thereof to abide the final judgment of the court as to validity or constitutionality of such statute.

GUY L. FAKE,
U. S. D. J.

APPENDIX D.

The Chancery Preliminary Injunction.

IN CHANCERY OF NEW JERSEY.

Between

STATE OF NEW JERSEY, by WALTER D. VAN RIPER, Attorney General,
Complainant,

and

TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, an Unincorporated Association, MARY HANSCOM, VIRGINIA WIGGLESWORTH, ELIZABETH RYAN and the NEW JERSEY BELL TELEPHONE COMPANY,
Defendants.

On Bill.

Order.

This matter being open to the Court by Walter D. Van Riper, Attorney General of the State of New Jersey, solicitor for and of counsel with the complainant, and acting for and on behalf of the State of New Jersey as complainant herein, and upon reading and filing the duly verified bill of complaint herein and the affidavits annexed thereto, and it appearing that sufficient cause being shown, therefore it is on this 19th day of April, 1947,

ORDERED that Walter D. Van Riper, Attorney General of the State of New Jersey, Harry C. Harper, Commissioner

of Labor of the State of New Jersey, and their agents, servants and employees, and all law enforcement officers of the State of New Jersey, and all persons in active concert and participation with them be and they are hereby enjoined and restrained as follows:

They shall hold in *status quo* all actions at law or in equity, civil or criminal, now pending in the New Jersey Courts and heretofore commenced by them under or pursuant to the terms and conditions of the statute complained of in these proceedings, and they shall take no further or other actions, civil or criminal, in any Court in pursuance of said statute except as hereinafter provided, until final hearing and decree thereon adjudging the constitutionality of Chapter 38 of the Laws of 1946 as amended and supplemented by Chapter 47 of the Laws of 1947.

Nothing herein contained, however, shall be construed to restrain the defendants above named from proceeding under the arbitration provisions of said statute without prejudice to their rights asserted in these proceedings, the result thereof to abide the final judgment of the Court as to the validity or constitutionality of the said statute, or from instituting such actions or suits as they may be advised are proper under any other statute of the State of New Jersey, or ordinance of any political subdivision thereof.

IT IS FURTHER ORDERED that a copy of this order and a copy of the verified bill of complaint, each of which will be certified by the solicitor for the complainant being a true copy be served upon the defendants, Traffic Telephone Workers' Federation of New Jersey, Mary Hanscom, Virginia Wigglesworth, Elizabeth Ryan, and the New Jersey Bell Telephone Company within five days from the date hereof.

A. DAYTON OLIPHANT,
Chancellor.

APPENDIX E.

Opinion.

(Filed July 3, 1947.)

(Reported in 72 Fed. Supp. 499.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, *et al.* *v.* ALFRED E. DRISCOLL, Governor of the State of New Jersey, *et al.*	Civil Action No. 10,064. On Application for Interlocutory Injunction.

Before BIGGS, *Circuit Judge,* and FAKE and MEANEY, *District Judges.*

By BIGGS, *Circuit Judge.*

Traffic Telephone Workers' Federation of New Jersey, an unincorporated association and Mary Hanscom, Virginia Wigglesworth and Elizabeth Ryan, brought suit against Alfred E. Driscoll, Governor of the State of New Jersey, and Harry C. Harper, Commissioner of Labor of the State of New Jersey, to enjoin the defendants from enforcing or attempting to enforce the provisions of Chapter 38, Public Laws of New Jersey, 1946,[1] as amended by Chapter 47, Public Laws of New Jersey, 1947,[2] from prosecuting criminal actions brought under the Act against the individual plaintiffs to impose the criminal sanctions pro-

[1] See N. J. S. A. 34:13B-1 to 34:13B-17.
[2] See N. J. Sess. L. 1947, c. 47 p. 78.

vided by the Act on them, from prosecuting an action at law under the Act, as amended, against the plaintiff Union to impose the penalties prescribed by the Act, from making or issuing any public statements, proclamations or orders to the public or to law enforcement officers or agents of the State of New Jersey, announcing or directing that the plaintiffs or any one acting in concert with them would be prosecuted civilly or criminally under the Act, and that a temporary restraining order be granted restraining the defendants from performing any of the actions referred to herein pending the hearing on the plaintiffs' motion for a preliminary or interlocutory injunction, and that a three-judge court be convened in accordance with Section 266 of the Judicial Code, as amended, 28 U. S. C. A. § 380, to grant the "preliminary relief" prayed for. The complaint ends with a prayer in the usual form for such other and further relief as may be just and equitable in the premises.

Jurisdiction in the suit at bar is based primarily upon Section 24(14) of the Judicial Code, 28 U. S. C. A. § 41(14), though other grounds of jurisdiction also are alleged. See *Hague* v. *C. I. O.*, 307 U. S. 496.

The complaint, when filed, was presented to the Honorable Guy L. Fake, Senior District Judge of the District Court of the United States for the District of New Jersey, who, on motion of the plaintiffs, supported by affidavits, on April 15, 1947 [3] granted *ad interim* restraint, to remain in force only until the hearing and determination of the application for an interlocutory injunction, and called to his assistance to hear and determine the application the Honorable Thomas F. Meaney, a Judge of the District Court of the United States for the District of New Jersey, and the present writer. On April 23, 1947 argument on the plaintiffs' motion for an interlocutory injunction was had and testimony was taken. At this hearing the Attorney General of New Jersey, appearing both *pro se* and on behalf of the State of New Jersey and of its officers, moved for a

stay of proceedings in this court pursuant to the provisions of Section 266 of the Judicial Code, 28 U. S. C. A. § 380. He stated, *inter alia,* to the court (1) that the prosecutions of the individual plaintiffs would be terminated forthwith; (2) that the statute of New Jersey against which the complaint was directed had been further amended by Chapter 75, Public Laws of New Jersey, 1947, approved the preceding day, April 22, 1947,[4] by excising certain provisions and adding others, and most important of all (3) that on April 19, 1947 the Attorney General of New Jersey had filed a bill of complaint in the Court of Chancery of New Jersey based on the New Jersey statute, as amended, praying, among other things, that Court to determine the constitutionality of the Act and to enjoin the plaintiffs in the instant suit from interfering with the operation of the New Jersey Bell Telephone Company by the State of New Jersey. On that day the Chancellor of New Jersey issued a preliminary injunction directed to the Attorney General of New Jersey and to other State officers requiring them to hold all pending proceedings under the New Jersey statute in *status quo* and to start no additional proceedings thereunder pending the determination of the constitutionality of the Act by the Court of Chancery.

At the close of the hearing on April 23, 1947 the parties stipulated that the restraining order issued by this court should remain in effect until the determination of the application for an interlocutory injunction. See the provisions of Section 266 of the Judicial Code. Cf. the provisions of

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[3] Judge Fake amended the order on April 18, 1947 to permit the plaintiffs to proceed with arbitration proceedings.

[4] See N. J. Sess. L. 1947, c. 75, p. 120. The changes effected need not be detailed in this opinion. It is sufficient to state that the provisions for criminal sanctions to be imposed upon individuals violating the Act were mollified, that an appeal was provided to the Supreme Court of New Jersey from decisions and awards of the Board of Arbitration, and the Attorney General of the State of New Jersey was authorized to file a bill in the Court of Chancery in the name of the State for an injunction to prohibit any violation of the provisions of the Act as amended, or for "any declaratory or other relief". As to declaratory relief, see Section 11 of Chapter 75, P. L. 1947.

Rule 65(b) of the Rules of Civil Procedure, 28 U. S. C. A. foll. § 723c, and the decision of the Circuit Court of Appeals for this Circuit in *Sims* v. *Greene*, 160 F. 2d 512, 516.

There was a further hearing before this court on May 13, 1947 at which time it was stipulated that the instant case, if the stay moved for by the Attorney General was not granted, should be heard and disposed of as if on final hearing. At that hearing it was stated to the court by the Attorney General of New Jersey that the criminal proceedings against the individual plaintiffs had been dismissed though the suit for penalties against the Union was still pending. We may also take judicial notice of the widely known fact that since the hearing of May 13 the dispute between the New Jersey Bell Telephone Company and the Union has been settled and that the strike has come to an end. The suit for penalties against the Union, however, is still pending. The Court of Chancery of New Jersey, of course, has not yet had time to dispose of the suit pending before it.

The defendants in the suit at bar point to the final sentences of Section 266 of the Judicial Code, as follows: "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the Attorney General of the State, that the suit in the State courts is not being prosecuted with diligence and good faith." The defendants insist that this court must stay its hand pending the final determination

of the suit brought by the Attorney General in the Court of Chancery. To this course the plaintiffs interpose numerous objections. We will deal with these in the order in which they are offered.

The plaintiffs insist, first, that the Court of Chancery of New Jersey is without jurisdiction to enjoin criminal prosecutions, *viz.*, those in which three individual plaintiffs are defendants, or to stay an action for collection of the statutory penalties prescribed by the Act. They cite the opinion of the Court of Errors and Appeals of New Jersey in the case of *Moresch* v. *O'Regan*, 122 N. J. Eq. 388, 192 A. 831 (1937). In the cited case the Court of Errors and Appeals held that the Court of Chancery was without jurisdiction to enjoin prosecutions of indictments or restrain the collection of penalties. It ruled also that the Declaratory Judgments Act of New Jersey, N. J. S. A. 2:26-66 to 2:26-79, did not extend the jurisdiction of the Court of Chancery. We may point out, however, that the statue of New Jersey here under consideration contains provisions for the exercise of its injunctive powers to prohibit violation of the Act and for "declaratory" relief. Putting to one side for the time being the question of whether the Court of Chancery, gaining authority and jurisdiction by virtue of the Act *sub judice*, may enjoin the prosecution of the suit instituted against the Union for penalties, it must be conceded that any question raised as to the sufficiency of the statute to authorize the enjoining of the criminal proceedings against the individual plaintiffs has become moot for the criminal proceeds against the individual plaintiffs have been dismissed. We cannot hold that the Court of Errors and Appeals of New Jersey will hold that the Court of Chancery was without the power to issue the injunction issued by it in the case before it; nor can we say that the Court of Chancery lacks the power or the jurisdiction to determine the constitutionality of the New Jersey Act. It is clear that the Legislature of

New Jersey has sought to confer additional jurisdiction on the Court of Chancery. The extent of that jurisdiction may be determined as appropriately by the State Courts of New Jersey as by the District Court of the United States for the District of New Jersey. Moreover, it may not be doubted that the Court of Chancery possesses the power to maintain the *status quo* respecting a suit pending before it and has done so by an injunction couched in appropriate words. A somewhat analogous question was before the Supreme Court of the United States in the cases of the *United States of America* v. *United Mine Workers of America,* U. S. * and the ruling in that case aids the view herein expressed. But the short answer to the plaintiffs' assertion is that an injunction did issue from the Court of Chancery restraining the Attorney General of New Jersey and the law enforcement officers of New Jersey from proceeding with the suit against the Union for penalties or from instituting any new suit or proceeding. That injunction is valid and subsisting. This court cannot overlook that fact.

The plaintiffs next assert that the bringing of the suit in Chancery was not authorized by the law of New Jersey and, referring to the proviso of Section 266 of the Judicial Code quoted above, assert that it must clearly appear that a suit brought in a State court is authorized under State law. The plaintiffs also cite the article "State Determination of State Law", Pogue, 41 Harvard Law Review 623, at p. 635, where the learned author takes the position that in the absence of a special State statute it is doubtful if a State tribunal possesses the authority to issue a stay with the purview of the language of Section 266 referred to. The theory cited is an interesting one. We are unable, however, to find any case directly upholding the plaintiffs' assertion in this connection. Cf. *Gen. Outdoor Advertising Co.* v. *Williams,* 9 F. 2d 165, 166 (D.

* Decided March 6, 1947.

Mass.), reversed on grounds not presently pertinent, (1 Cir.) 12 F. 2d 773. In fact the authority of the decisions clearly looks the other way and we may doubt if Congress intended to complicate the situation by requiring the Legislatures of the respective States to pass special acts to bring the orders of their respective tribunals within the purview of Section 266. See note 6 to Section 380 of Title 28 of the United States Code Annotated and the authorities cited therein.

Next the plaintiffs insist that the suit in Chancery is not one "to enforce the statute" within the proviso of Section 266. It is indeed somewhat of an anomaly for a legislature to provide for decrees of a Court of Chancery to aid the law enforcement officers of a State when there are applicable criminal sanctions set up in the statute itself and it is the duty of State law enforcement officers to see that violators of the provisions of the statute are brought to book before appropriate tribunals of the State. In short the Constitution and laws of New Jersey have provided means and machinery to enforce the criminal statutes of the State. The remedy of injunction is usually considered to be purely preventative in nature and a defendant ordinarily is not punished by a Court of Chancery for any statutory crime which he may have committed, punitive sanctions usually being left to the criminal courts. But we are aware that legislation relating to labor is in a condition of flux and that the legislatures of the States have passed many acts relating to labor within the last twenty-four months. The legislatures of the States to some degree at least are to be treated as laboratories in which experimentation may be conducted for State purposes albeit within the courses specified by the Constitution of the United States. We cannot say that because the Legislature of New Jersey has followed what may seem to us, or to others, the anomalous course of arming New Jersey law enforcement officers with Chancery decrees which may be employed against alleged

wrong-doers, the pending Chancery suit is not one to enforce the statute *sub judice*, or that the proceeding in the Court of Chancery is not one "prosecuted with diligence and good faith" as Section 266 requires. Many an anomaly of the law has become its settled practice after a lapse of time.

The plaintiffs also contend that the Chancery suit was not accompanied by a stay of all proceedings under the challenged statute and the restraint ordered by the Chancellor is not so broad in scope as the temporary relief prayed for or already granted in this court. Conceding that the stay contemplated by Congress in Section 266 was a general one, we cannot concur with the views expressed in *Northwestern Bell Telephone Co.* v. *Hilton*, (D. C. D. Minn.), (1921), 274 F. 384, in which it was held that the stay given in the State court must be the equivalent of an interlocutory injunction. The injunctive order of the Court of Chancery, as we read it, is precisely within the terms of the proviso of Section 266.

Next the plaintiffs assert that the action in the State court is not a *bona fide* suit involving a genuine controversy but is a fictitious one insofar as it relates to the injunction granted by it. It is true that no cause of action is alleged against the Attorney General or the Commissioner of Labor of New Jersey. Cf. *Munday* v. *Vail*, 34 N. J. L. 418; *Hubbard* v. *Montross Metal Shingle Co.*, 79 N. J. L. 208, 74 A. 254. The seventh prayer of the bill in chancery, however, prays for a restraining order and the Chancellor of New Jersey saw fit to grant the relief prayed for. That the Attorney General of New Jersey presented the bill and applied for the injunction against himself and the other law enforcement officers of the State must again be characterized as anomalous. But mere anomaly is insufficient to invalidate a statute or an injunction. We cannot believe that the Court of Chancery issued a frivolous order. We must assume that a violation of the injunction

of the Chancery Court by the Attorney General or by any other law enforcement officer of New Jersey would bring upon him or them adequate punitive sanctions to be applied by the Chancellor. Moreover, Section 266 states that if the suit in the State court is not being prosecuted with diligence and good faith this court may vacate any stay issued by it. The doors of the District Court of the United States will remain open.

Finally, the plaintiffs assert that because the chancery suit was filed and the Chancellor's injunction was obtained after the entry of the temporary restraining order in this court the proviso of Section 266 hereinbefore quoted does not apply. In support of their position the plaintiffs cite *Union Light, Heat & Power Co.* v. *Railroad Commission,* (D. C. E. D. Ky.), (1926), 17 F. 2d 143, 147, and in particular that part of the opinion which reads: "That portion of the section dealing with abatement of the action in the federal court obviously refers to those cases where no temporary restraining order has been issued and where, before final hearing on the application for the interlocutory injunction, a suit has been brought in the state court to enforce the statute or order complained of, accompanied by a stay of all proceedings under such statute or order. We cannot conceive how that portion of section 266 of the Judicial Code relied upon by the defendants can be construed to apply to a case where a temporary restraining order issued by the federal court was in full force and effect at the time those against whom it was directed instituted their suit in the state court to enforce the state statute or order complained of."

With all respect we must state that we are unable to agree with the reasoning and conclusions of the learned Court. As we read the proviso of Section 266 there is no limitation in time save that the injunctive relief granted by the State court must have issued before the final hearing of the application for a preliminary injunstion in the District

Court of the United States. In the case at bar, as we have stated, the Chancellor issued his restraining order on the 19th of April, 1947, and the hearing in this court upon the application for preliminary injunction was had on April 23, 1947. The action of the Chancellor of New Jersey in our opinion is literally within the purview of the language of Section 266 hereinbefore quoted.

In their complaint, in their briefs and in their arguments the plaintiffs lay emphasis upon the denial of their civil rights by the New Jersey Act against which relief is sought. The plaintiffs assert also that the New Jersey statute deprives them of rights secured to them by Congress under the National Labor Relations Act, 29 U. S. C. A. §§ 151-166, and under the Smith-Connally Anti-Strike Act, 50 U. S. C. A. App. §§ 1501-1511. They contend in substance that since the New Jersey statute will have an impact, disastrous in their view, upon rights and privileges secured to them by the Constitution of the United States and by federal laws, this court, having first obtained jurisdiction, should presently adjudicate every pertinent question involved and should not stay its proceedings. The reach of the New Jersey Act is indeed broad, even as modified by the amendments, but we are convinced that Congress intended the effect of the proviso of Section 266 to be such that when its requirements have been met by the appropriate action in and by a State tribunal, a District Court of the United States must stay its hand unless and until the State tribunal should declare itself to be without power to determine the issues. The Constitution and laws of the United States are before the Court of Chancery of New Jersey which must determine the rights of the parties, and, if there be error in the decision of that tribunal, a result which we cannot presume, an appeal lies therefrom to the Court of Errors and Appeals of New Jersey. From that Court the plaintiffs may bring their case before the Supreme Court of the United States. To assume that the plaintiffs

would not receive justice under such circumstances is to presume an absurdity.

The provisions of Section 266 of the Judicial Code, as well as those of Section 265, 28 U. S. C. A. § 379, were intended to effect comity between Federal and State tribunals to preserve the independence of each. We think we need dilate no further upon this subject except to point out that in the recent decision in *A. F. of L.* v. *Watson*, 327 U. S. 582, 595-599, the Supreme Court of the United States pointed out the desirability of a district court of the United States not passing upon the merits of a controversy concerning the provisions of a State constitution until the question had been authoritatively construed by the State court. What the Supreme Court has stated in the cited case in respect to the constitution of a State we deem to be applicable to the New Jersey statute now before the Court of Chancery.

In our opinion we are required to grant the motion of the Attorney General of New Jersey for stay.

In view of what we have stated it is presently unnecessary for us to pass upon the numerous applications for intervention in the suit at bar.

An order may be submitted.

A true Copy:

Teste:

Clerk of the United States District Court for the District of New Jersey.

APPENDIX F.

Order Granting Stay of Proceedings.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, an Unincorporated Association, MARY HANSCOM, VIRGINIA WIGGLESWORTH and ELIZABETH RYAN, individually, Plaintiffs, *vs.* ALFRED E. DRISCOLL, Governor of the State of New Jersey, WALTER D. VAN RIPER, Attorney General of the State of New Jersey, and HARRY C. HARPER, Commissioner of Labor of the State of New Jersey, Defendants.	Civil Action No. 10,064. Order Granting Stay of Proceedings.

Before BIGGS, *Circuit Judge*, and FAKE and MEANEY, *District Judges*.

This matter having come on to be heard on April 23, 1947, on motion of the plaintiffs in the above entitled cause for an interlocutory injunction against the above named defendants, on plaintiffs' complaint, duly verified by the affidavits of Mary Hanscom, Virginia Wigglesworth, Elizabeth Ryan, Henry Mayer, Cecil V. Rowe, Florence Kersten, Dorothy Sullivan and Elsie Steter, and on testimony taken in open Court; and the Honorable Walter D. Van

Riper, Attorney General of the State of New Jersey *pro se*, and on behalf of the other defendants, having at the same time moved for a stay of the proceedings in this cause, under Section 266 of the Judicial Code of the United States, on the ground that on April 19, 1947 he commenced an action in the Court of Chancery of New Jersey, in the name of the State of New Jersey against plaintiffs in this cause and New Jersey Bell Telephone Company, for certain relief, in which action the Chancellor of the State of New Jersey entered an *ex parte* restraining order against the said Walter D. Van Riper, Attorney General of the State of New Jersey, Harry C. Harper, Commissioner of Labor of the State of New Jersey, and their agents, servants and employees, and all other law enforcement officers in the State of New Jersey, and all persons acting in concert and participation with them, substantially in the language of the temporary restraining order entered in this cause on April 15, 1947;

And it further appearing that by a stipulation of the parties filed in this cause and approved by the Court, it was agreed and ordered that if the stay moved for by the Attorney General was not granted, this Court should dispose of this cause as if on final hearing, and enter a final decree on the merits; and the Court having read and considered the pleadings and proofs, and the briefs and argument of counsel, and having filed its opinion in this cause dated July 3, 1947, which constitutes its finding of fact and conclusions of law; it is on this 2nd day of October 1947,

Ordered that the said motion for a stay made by the Attorney General of the State of New Jersey is granted for the reasons stated in the opinion of the Court filed July 3, 1947, and that all proceedings in this cause to restrain the enforcement of P. L. 1947, Chap. 47, as amended by P. L. 1947, Chap. 75 of the Laws of the State of New Jersey, be stayed pending the final determination of the aforesaid action now pending in the Court of Chancery of New Jersey.

The stay herein granted may be vacated upon proof made after hearing and notice of 10 days served upon the Attorney General that the said action in the Court of Chancery is not being prosecuted with diligence and good faith.

By the Court,

JOHN BIGGS, JR.
GUY L. FAKE.
THOMAS F. MEANEY.